Supreme Court, U.S.
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No. 10-556

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In The

Supreme Court of the United States

SURESH BADRINAUTH,

Petitioner,

v.

METLIFE CORPORATION; VIRGEL AQUINO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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October 2010

QUESTIONS PRESENTED

1. Are due process and constitutional rights to a fair and speedy trial compromised when a three judge panel is consisted of judges nominated by the same political party and accordingly share the same philosophies and ideologies?

2. Are litigants' rights to a fair, impartial, well-paced and well-balanced hearing undermined by the deliberate delay in Congress of confirming federal judges and its attendant negative effect on the composition of such panels?

3. Is the finding of facts by a judge on a motion for summary judgment an unconstitutional expansion of the Seventh Amendment or, if not, is it an abuse of judicial discretion to grant repeated motions for summary judgment some six years into litigation, and also after surviving numerous previous motions to dismiss – in light of the objectives set forth in *Celotex v. Catrett*?

4. Are appellant's due process rights abrogated by an appellate court which instantly parrots a District Court's opinion without reading the briefs and/or considering the evidence, and consequently fails to correct substantive factual errors propounded therein and ignores cited case law which contravenes that opinion?

PARTIES TO THE PROCEEDING

The caption names all of the parties to the proceedings in the court of appeals below.

Petitioner Suresh Badrinauth was the plaintiff in the district court. Respondents Metlife Corporation and Virgel Aquino were defendants. In the Court of Appeals for the Third Circuit, Suresh Badrinauth was the appellant, and Metlife and Virgel Aquino were the respondents.

LEGAL DISCLAIMER

Petitioner states that if he is given the high honor and distinct privilege of having his case heard in this court, he will secure the services of counsel and expert legal help.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
LEGAL DISCLAIMER	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS AND RULES INVOLVED	1
STATEMENT AND FACTS OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
QUESTIONS 1 AND 2	5
QUESTION 3	10
QUESTION 4	16
CONCLUSION	20

APPENDIX

Badrinauth v. Metlife Corporation, et al.: 2010 U.S. App. LEXIS 4934, 368 Fed. Appx. 324 ....App. 1

Badrinauth v. Metlife Corporation: No. 04-cv-2552 (PGS), Apr. 2, 2008 ....App. 10

TABLE OF CONTENTS – Continued

Page

Badrinauth v. Metlife Corporation, et al.: 2009 U.S. Dist. LEXIS 39507 (D.N.J. May 7, 2009)..... App. 21

Badrinauth v. Metlife Corporation, et al.: No. 09-2631, May 26, 2010..... App. 25

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 12

Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326 (3rd Cir. 1995) 20

Brown v. City of Long Branch et al., LAR 34.1(a), May 11, 2010 10

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 20

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 12

Holley v. Dep't of Veteran Affairs, 165 F.3d 244 (3rd Cir. 1999) 19

Matsushita v. Zenith Ratio Corp., 475 U.S. 574 (1986) 12

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 11

Rivas v. Brattesani, 94 F.3d 802 (2nd Cir. 1986) 14

Stanley v. Illinois, 405 U.S. 645 (1972) 20

United States v. Muniz, 49 F.3d 36 (1st Cir. 1995) 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. Const. amend. V 2

U.S. Const. amend. VI 2

U.S. Const. amend. VII 2

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dismissing the appeal is 2010 U.S. App. LEXIS 4934, 368 Fed. Appx. 320, is reprinted in the Appendix to the Petition ("Pet. App.") at App. 1-8. The District Court's opinion is unreported 2009 U.S. Dist. LEXIS 39507 (D.N.J. May 7, 2009), and is reprinted in the Pet. App. at App. 9-17.

JURISDICTION

The Court of Appeals entered judgment on March 08, 2010, and entered an order denying petitioner's motion for rehearing on May 26, 2010. This court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS AND RULES INVOLVED

1. Fed. R. App. P. 4(a)(1)(A):

"In a civil case. . . . , the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

2. Fed. R. Civ. P. 56(c):

Summary judgment should only be granted "if the pleadings, discovery and disclosure material on

file, and any affidavits show there is no genuine issue as to any material fact." Summary judgment should only be granted "if the pleadings, discovery and disclosure material on file, and any affidavits show there is no genuine issue as to any material fact."

Due process rights under the Fifth Amendment, right to a fair and speedy trial under the Sixth Amendment and right to a trial by jury under the Seventh Amendment of the Constitution.

STATEMENT AND FACTS OF THE CASE

(a) *Pro Se* Petitioner Suresh Badrinauth ("Badrinauth"), originally worked as an operations Manager for a New York broker-dealer, Nathan and Lewis Financial Services (NLFS), which was subsequently taken over by defendant Metlife Corporation on or about 2000. The conversion from NLFS began on or about January 2002 and was completed on or about July 2003 at which time almost all of NLFS employees relocated to Metlife's Iselin, New Jersey offices.

In February 2002, a member of Badrinauth's staff informed him that he was being paid an incorrect rate for the overtime work he performed. Badrinauth immediately notified the human resources department of Metlife of this apparent mistake. However, he was rebuffed and told that it was Metlife's policy to pay a flat overtime rate of $16.00, even to these employees who were making substantially more in their normal hourly wages.

On or about April 2003, Badrinauth's staff members again complained vigorously to him of the unfairness and illegal manner in which they were being forced to work for unlawful wages by this *Fortune 100* company. Badrinauth again complained to his managers and told them that if they did not change this unlawful practice, he would report the matter to the U.S department of labor.

One of his managers, Robert Costello, threatened Badrinauth both verbally and by email. Badrinauth was then subjected to a vicious campaign of retaliation, discrimination and smear which culminated with his dismissal on June 30, 2003 for. . . "violation of ethics."

At issue are trades that Badrinauth placed in his trading account on or about May 28, 2003. Metlife contends that Badrinauth was short selling and 'playing' the market. In fact, there was no material gain and Badrinauth lost approximately $30,000.00 by trading in his account. There were no SEC, NASD or FINRA or even Metlife rules broken. Badrinauth placed the trades with the Director of trading, who had the option of refusing the trades. In fact, Badrinauth did the exact trades in February 2003 with the full knowledge and approval of his managers and there was no issue. It only became an issue when Badrinauth threatened to go to the Department of Labor in April 2003.

Badrinauth was dismissed via a telephone call from President of Metlife broker-dealer, Virgel Aquino, which was recorded. On the call, Aquino vouched for Badrinauth's professionalism and promised to offer

letters of recommendation while apologizing for having to fire Badrinauth while saying the matter was, "'out of his hands.'"

Badrinauth was the epitome of the quintessential worker. In nearly seven (7) years of employment: He was never late or absent, never had an adverse or bad report, won numerous employee of the month awards, won numerous letters or recommendation from both fellow employees and customers. At no time did anyone for any reason question Badrinauth's job performance, enthusiasm, attitude or work ethic.

In short, Badrinauth has never done anything to ever impugn his professional integrity or put his job in jeopardy.

(b) Badrinauth commenced his lawsuit on June 01, 2003 filing *Pro se* in the District Court of New Jersey. The case was originally assigned to District Judge, the Honorable Joseph Greenaway Jr. Defendants, through their counsel Proskauer Rose LLP filed numerous and repeated motions for dismissal, which were rejected by Judge Greenaway who in an instance of exasperation accused the defendants of trying to mislead the court.

On or about June of 2007, the case was reassigned to the Honorable Judge Peter Sheridan Jr. Defendants with unlimited resources again sought to overwhelm the *Pro se* plaintiff by filing a motion for summary judgment. New District Judge Sheridan denied defendant's motion on April 02, 2008.

Defendants filed a **second motion** for summary judgment in January 2009, and this time Judge

Sheridan promptly ruled in defendant's favor dismissing the case with prejudice on May 05, 2009.

On October 15, 2009, Badrinauth again proceeding *Pro Se* filed his opening brief at the Court of appeals for the Third Circuit. On March 09, 2010, the Appellate Court ruled affirming the district court's ruling. Approximately one week later, the Appellate Court ruled that the admissibility of Badrinauth's reply appendix (a critical part of his case) was considered "moot," even though the appendix was received fully one week **before** the deadline.

REASONS FOR GRANTING CERTIORARI

Our legal system is currently in a judicial crisis where 104 of the approximately 850 lower federal judgeships are unfulfilled. The confirmation of district and circuit judges are subjected to delays that have reached unprecedented levels, which have subverted the Sixth Amendment to a speedy trial. This is having severe repercussions in the courts, and results in cases being delayed, decisions being arbitrarily reached and circuit court panels being selected in a manner which prejudices the litigants.

QUESTIONS 1 AND 2.

(a) The rampant politicization of the selection process is undermining public respect for the co-equal branches of government. The party not in control of the White House invariably believes it will recapture the presidency in the next election and thus has the

opportunity to appoint judges more to its liking. Accordingly, each nominee obstructed now is another vacancy reserved for the out-of-power party's president.

Legal Scholar and Supreme Court analyst Dahlia Litwick contends, "*It stands to reason that if you can't get into a courtroom, if the docket is too packed for your case to be heard promptly, or if the judge lacks sufficient time to address the issues raised, justice suffers. This will directly affect thousands of ordinary Americans – plaintiffs and defendants – whose liberty, safety, or job may be at stake and for whom justice may arrive too late, if at all. In some jurisdictions, civil litigants may well wait two to three years before going to trial. In jurisdictions with the most vacancies, it will often take far longer for published opinions to be issued, or courts will come to rely on more unpublished opinions. More worrisome still, because the Speedy Trial Act requires that courts give precedence to criminal cases, some backlogged courts have had to stop hearing civil cases altogether.*"

Without any clear mandate, both parties have voiced vehement pleasure at the process. Senator Hatch, for Chairman of the Senate judiciary committee says, "The filibusters used to block such votes have mired the judicial-confirmation process in a political and constitutional crisis that undermines democracy, the judiciary, the Senate, and the Constitution." Current chairman of the Senate Judiciary Committee Patrick Leahy says, "we can, and must, do a better job responding to the judicial vacancy crisis."

Attorney General Eric Holder writes, "The federal judicial system that has been a rightful source of pride for the United States – the system on which we all depend for a prompt and fair hearing of our cases when we need to call on the law – is stressed to the breaking point.

In 1997 and again in 2001, U.S. Supreme Court Chief Justice William Rehnquist admonished the White House and Senate, then in control of opposite parties, to fill the many vacancies for "the good of the nation."

In the absence of any guidance, rule or directive of law which guide the confirmation process of federal judges this judicial crisis is likely to become a . . . judicial catastrophe!

That's why in a speech in August of this year, Supreme Court Justice Anthony Kennedy warned: ***"It's important for the public to understand that the excellence of the federal judiciary is at risk. If judicial excellence is cast upon a sea of congressional indifference, the rule of law is imperiled."***

(b) The Law School of the University of Chicago did a study in 2003 titled, *"Ideological Voting on Federal Courts of Appeals": A preliminary investigation.* Their investigation revealed a startling result: Party and Panel, Influenced votes of Individual Judges.

The law school further came up with the notion of *ideological amplification*, which is where a judge's ideological tendency is likely to be amplified if he/she is sitting with two judges from the same political party. A Democrat appointee should show an increased tendency to vote in a stereotypically liberal fashion if accompanied by two Democratic appointees, and a Republican appointee should be more likely to vote in a stereotypically conservative fashion if accompanied by two Republican appointees.

The University of Chicago examined a total of 4,488 published panel decisions and 13,464 associated individual judge's votes in and found this was true for most areas of the law. Thus to ensure fairness, parity of judicial thought and due process . . . every effort should be made to ensure that Appellate panels should be made up of judges who are appointed by both Republican and Democratic Presidents.

(c) Because of the delays by congress in confirming federal judges, circuit courts have to make do with the current judges on their roster. Consequently, the composition of Appellate panels will not have the needed political, social and judicial diversity needed to ensure a full and impartial hearing. To have a three judge panel which shares and was selected for the same judicial philosophy and are pre-disposed to vote in predictable ways . . . directly violates the inherent premise of a fair and impartial hearing.

The wisdom of this argument is not lost on other courts and institutions. **For example, by statute,**

no more than five of the nine members of the Court of International Trade may be from any one political party.

(d) There were two judges who were nominated to the Third Circuit, and whose delays directly influenced the outcome of my case. Judge Greenaway was nominated by President Obama on June 19, 2009 and he was confirmed on February 09, 2010 by a vote of 84-0. Judge Thomas Vanaskie was nominated by President Obama on August 06, 2009. He was confirmed when Senate Majority Leader Reid had to employ the extreme measure of cloture (rarely used measure, to overcome the obstruction of the opposing party) on April 15, 2010 which then resulted in Judge Vanaskie being confirmed on April 21, 2010.

The approximate time for confirmation of each of these two judges was 236 days which is more than three times longer than it takes to confirm a Supreme Court justice (74 days).

If any of these judges were confirmed in time, which would have resulted in a change in the judicial make-up of the Third Circuit, then it is most likely that the composition of the Appellate panels would have been more diverse, fair and balanced. Especially in the Third Circuit which has an equal number (six) of Republican and Democratic appointees.

Each of the three judges in Badrinauth's case has a documented anti-employee and pro-employer voting record. This comports with the stereotypical prototype of a judge selected by a Republican President.

Consider the facts, in the past three years this same panel has ruled on approximately 39 cases that involved employee and employer dispute. In each and every one of these appeals, this panel voted time and time again with the employer and against the employee . . . exactly as they are expected to do.

Conversely, judges who are nominated by a Democratic President consistently vote pro-employee. This is illustrated in the recent case in the same Third Circuit: *Brown v. City of Long Branch et al.*, LAR 34.1(a), May 11, 2010 which panel of Democratic appointed judges vacate in part and remand for further proceedings.

The conclusion is that even though *Badrinauth* and *Brown* had relatively similar cases, the outcomes were different because of the composition of the political make up of the panel of judges.

Therefore, without a balance of political appointed (and thus judicial diverse) judges on the same panel, the outcome of cases will always be disputed.

QUESTION 3.

(A) Summary judgment is unconstitutional because it denies the plaintiff the right to a trial guaranteed by the Seventh Amendment. More cases are dismissed in this manner that any other legal procedure. It must therefore by abolished or **modified in its current form to allow for the very**

same thing it is there to ensure – the right of meritorious claims to have their day in court.

Former Supreme Court Chief Justice Rehnquist referred to summary judgment as a "disfavored procedural shortcut."

Many states realized the virtue of the Seventh Amendment and have constitutional jury trial rights in their respective states. The Seventh Amendment provides that in suits at common law the right of the jury trial shall be preserved because no action similar to summary judgment existed at that time. Under common law, the jury or the parties involved determine the facts and the case, not the judge. Because the Supreme Court has never clarified what constitutes the composition of common law, courts have now moved away from the jury to the judge as the decision maker . . . where it should not be. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

However, there is a growing chorus that summary judgment is a burden rather that a boon since its outcome disproportionately favors defendants.

"It is much more difficult for a plaintiff than a defendant to obtain a summary judgment, because the plaintiff has the burden of proof." And in a recent study in fiscal year 2000, judges in the Eastern District of Pennsylvania granted 293 motions for summary judgment – 87 for plaintiffs and a whopping 206 for defendants. U.S. District Judge Jack Weinstein stated that, "summary judgment poses a threat to the continued viability of the seventh amendment."

Today, only 2% of all civil lawsuits which are filed – eventually go on to trial.

In 1970, in *Adickes v. S.H. Kress & Co.*, the Supreme Court continued its cautious approach to summary judgment. The *Adickes* Court reversed the lower court's grant of summary judgment, holding that the defendant-movant had not met its burden of affirmatively refuting an essential element of the plaintiff's case.

(B) In this case, the district court used the sole case of *Celotex Corp. v. Catrett*, 477 U.S (1986) to justify its rulings. *Celotex* is part of a trilogy of cases (the other two being *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita v. Zenith Ratio Corp.*, 475 U.S. 574 (1986)) which are referenced more than any others to dismiss federal lawsuits. *Celotex* states that summary judgment is designed to "**secure the just, speedy, and inexpensive**" determination of every action. I respectfully submit that my case refutes each of these contentions and offers undisputable proof that *Celotex* is fatally flawed.

1. JUST

Badrinauth tried everything in his power to avert the need to appear before this or any other court. **During his employment Badrinauth either verbally or by email, tried to alert his bosses, every echelon of human resources personnel and the head of compliance and ethics department that he was being retaliated against for disputing the illegal overtime issue and collaterally being treated**

unfairly, unethically and unlawfully. At no time did anyone from HR, Compliance or any internal investigative unit ever respond. Badrinauth's boss and Metlife V.P. Aquino is the only manager who respond by voicing his displeasure to Badrinauth of "going over his head."

Badrinauth was terminated for "violation of ethics" by Aquino on June 30, 2003.

However, after Badrinauth filed his lawsuit, Metlife sprang into action in a way which was lacking during Badrinauth's employ, hiring one of the biggest and best law firms and threatening to destroy him.

2. SPEEDY

The duration of this case from inception (2003) to termination (2009) has been **six years**. After several failed motions to dismiss, the defendants filed the first summary judgment in April 2007 and the second was resolved in May 2009. It took more than two years to merely determine the merits of these two motions. I humbly submit that this case would have been adjudicated by a jury and completed – in the way our founding fathers and the constitution intended . . . long before the incorrect ruling of the district court was handed down. The deliberations during these six years were protracted, emotionally draining, stressful and financially ruinous. A ruling by summary judgment is the quintessential legal anti-climax and undermines the basic premise of our legal system. . . justice for all!

3. INEXPENSIVE

The costs associated with litigating this case has likely surpassed **one million dollars** for the parties combined, and if it were not for summary judgment, settlement negotiations may well have disposed of this case many years ago.

The proven facts now show that the single case law *Celotex*, which was used to dismiss the case is flawed. Though the Court found that summary judgment was appropriate in this case, *Celotex* does not stand for the notion that one-line, conclusory summary judgment motions are sufficient.

After six years of litigation, two District Court Judges, three Magistrate Judges, hundreds of hours of testimony and thousands of pages of evidence, a judge (should not be allowed to) and may not interject his personal opinions or observations to such an extent that they impair a litigant's right to a fair trial (*Rivas v. Brattesani*, 94 F.3d 802 (2nd Cir. 1996)).

(C) Because of my experiences in this case, I respectfully submit that if the following four conditions are first satisfied in any civil case, summary judgment may NOT be applied. The requirement could hold for both parties and the courts, and is similar to the four conditions which must first be met before the seventh amendment applies:

(1) If a case has lasted for more than five years without dismissal, there has to be some inherent merit, and summary judgment should not be allowed.

(2) If a case has passed the severity test, (loss of a job, home, loved one, etc.) then the case has implied merit and summary judgment should not be allowed.

(3) If the combined expense of trial (spent or expected to spend) is more than half a million dollars then it is not a frivolous lawsuit and summary judgment should not be allowed.

(4) If a case has been adjudicated by at least three federal or magistrate judges (my case has five), then our legal system has made enough of an investment in the constitutional outcome and should preclude the arbitrary ruling of a judge by summary judgment.

University of Illinois, Law Professor Suja Thomas puts it best and wrote in *Against Summary Judgment*. "Summary judgment might be a wonderful procedure were it not inefficient, unfair and unconstitutional. It is inefficient because it gives the defendant the incentive to impose costly and time-consuming burden of discovery and motions practice upon the plaintiff, the court and itself, rather than to settle early and avoid these costs. It is unfair because it requires a judge to decide the case in a contest in which ruling for the defendant speeds along the judge's docket, whereas finding for the plaintiff potentially invites a trial that would backlog the docket and bring both criticism and an increased workload upon the judge.

Summary judgment thus creates a systemic bias against one of the two categories of litigants (plaintiffs),

arguably the most egregious problem that can plague a civil justice system. Finally, when the amendment was ratified, no procedure existed that imposed the limits on the right to a jury trial that are now imposed by summary judgment."

QUESTION 4.

(a) Fundamental to our courts is the inherent belief of fairness, fundamental to the public is a trust in our legal system that justice is blind, and our judges are sworn to uphold the constitution's linchpin . . . justice for all! It is crucial to public confidence in the courts that judges be seen as enforcing the law and obeying it themselves. *United States v. Muniz*, 49 F.3d 36, 43 (1st Cir. 1995). *Dahlia Lithwick* writing in *Newsweek* decried the deplorable state of the legal system, and its culture of evading responsibility at every stage of litigation . . . with "appellate courts wordlessly affirming the trial judge." When this happens, the due process of litigants are denied and the confidence of the judiciary is put at risk.

The briefs and appendices totaling approximately 700 pages were delivered to the panel on March 08, 2010 for review. In record time, the very next day on March 09, there was an eight page 'plenary' opinion on the Third Circuit's website affirming the District Court's order. The Appellate Court's opinion was eerily similar and almost identical to the District Court.

In addition, one week AFTER the opinion, the lead judge on the panel ruled that Badrinauth's reply appendix was not considered in their deliberations.

This was shocking because in his reply brief, Badrinauth made numerous references to his reply appendix and it was crucial to his pleadings. It can only be surmised that if the panel had read, studied and examined the reply brief . . . they would have known that there is an accompanying reply appendix.

(b) But much more disturbing are the findings by the Appellate Court. Each and every one of their findings is directly and without ambiguity dispelled by the evidence.

Listed below are the four most blatant errors of the Appellate Court:

(1) On Page 8, ln. 4, of the Appellate opinion, it states, "there is overwhelming evidence suggesting that Badrinauth was discharged for violating company policy regarding his brokerage account." However, the evidence will show that during the entire six years of legal deliberations of this case (and in the briefs and appendices) Badrinauth conclusively proved in his brief and appendices that there was no company policy, booklet or manual regarding brokerage accounts. Also, Metlife has never provided any such "company policy." **Consequently, the Appellate Court ruled in favor of a policy which is not known, does not exist and certainly not provided to the court.**

(2) Also, on Page 8, ln. 7, the opinion went on to say that there is a "nearly four-month gap between Badrinauth's threatened notification to the DOL and his discharge." The evidence and defendant Aquino's own testimony conclusively proved that the time-frame was approximately five weeks which more than adequately satisfies the requirement of temporal proximity!

(3) The Appellate Court did not find any evidence of a 'causal connection.' Yet, in appellant's brief he listed fifteen (15) instances of causal connection including (a) personal email threats from his manager (b) the only employee at the job site being monitored by close circuit cameras (c) despite receiving a nearly 90% score on his review, he was the only manager without a pay raise (d) Badrinauth was no longer invited to manager's meetings (e) despite numerous requests, HR refused to intervene and assist Badrinauth etc., etc.

(4) Badrinauth listed and proved at least seven (7) material mistakes made by the district court, the Appellate opinion did not even acknowledge these errors.

There are other collateral issues with the instant opinion, such as it is the only opinion dating back for the past five years in the Third Circuit which does not identify the appellant as *Pro se*. Also the Circuit's website confirmed that the opinion was the fastest handed down for a case of this magnitude and duration. The Third and indeed all circuits have a proven history of threatening *Pro se* plaintiffs liberally, and "*must apply the correct law regardless of whether he*

has mentioned it by name." Holley v. Dep't of Veteran Affairs, 165 F.3d 244, 247-248 (3rd Cir. 1999). Surely the Appellate Court did anything but treated the appellant's petition liberally, and contradicts this and every other federal court.

In most Appellate Courts, the above four points would have been sufficient to overturn the lower court's decision, but not in this court. The only conclusion is that the panel did not study the briefs and appendices, but instead simply parrot the district court's opinion.

(c) In Petitioner's appeal to the Third Circuit, he conclusively proved that Judge Sheridan made at least seven (7) mistakes in his relatively short time on this case. Some of these mistakes are quite serious and include: making up evidence that is nowhere on the record, creating testimony, citing evidence that do not exist . . . all of which cast Plaintiff in a negative light. The judge ultimately used this false evidence to come to his decision. In their answer brief, defendant tried to clarify three of the judge's mistakes while falsely quoting evidence that does not exist to help validate the judge's fourth error. On the remaining three serious errors committed by the District Court, the defendant could and did not offer any defense.

The Appellate opinion on this case of March 09, 2010, contradicted the tenets of the Third and every other circuit by not discussing or even acknowledging the obvious Judicial misconduct of the district court.

None of the appellant's arguments were considered, the review was anything but plenary and the

needed requirement that a "court reviewing a summary judgment motion must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 330 (3rd Cir. 1995) . . . was not applied. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972).

It is now clear that there were serious errors made at the Appellate Court and they abrogated their responsibility, which resulted in the denial of due process to the petitioner. This court now has an opportunity to send a clear signal to the circuit courts that this behavior violates the fundamental premise of fairness, justice and liberty for all.

CONCLUSION

The Court should grant the petition for a writ of certiorari, and reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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October 2010

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2631

SURESH BADRINAUTH,
Appellant

v.

METLIFE CORPORATION; VIRGEL AQUINO

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 04-cv-2552)
District Judge: Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 8, 2010

Before: SMITH, FISHER and GARTH, *Circuit Judges*

(Filed: March 9, 2010)

OPINION

PER CURIAM

Appellant Suresh Badrinauth appeals from the District Court's April 2, 2008 order, as amended by its April 7, 2008 order, denying in part Defendants'

motion for summary judgment without prejudice. He further appeals from the District Court's May 7, 2009 order granting Defendants' renewed motion for summary judgment. We will affirm both rulings.

I.

In 1996, Badrinauth began employment with Nathan & Lewis Company ("NL"). In 2002, NL was acquired by Defendant Metropolitan Life Insurance Company ("MetLife"), and Badrinauth became an employee of MetLife until he was discharged from the company in June 2003. At some point between December 2001 and January 2002, Badrinauth met with Defendant Virgel Aquino[1] and a member of MetLife's human resources department to discuss the transition of employees from NL to MetLife. At that time, Badrinauth was offered, and he accepted, a position as a Cashiering Manager in the BDRC. He reported directly to Robert Costello, who reported to Aquino.

Badrinauth alleges that in or around May 2002, he became aware that MetLife was not paying its employees overtime pay at the required rate. Badrinauth alleges that he raised the issue with Robert Costello on two occasions – in May 2002 and

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[1] During the period of Badrinauth's employment with MetLife, Aquino was the Chief Operating Officer of a Broker Dealer Resource Center ("BDRC") in New Jersey, which was operated by MetLife.

February 2003. He also alleges that he threatened to inform the Department of Labor ("DOL") about the issue, but that he never reported the alleged violations to the DOL or any other agency. MetLife avers that it became independently aware of the concerns raised by certain employees regarding the calculation of overtime pay and issued supplemental payments to the affected employees.

Around May 2002, Badrinauth, along with his fiancee, opened a personal brokerage account with MetLife. In or around June 2003, during a routine review of employee accounts, Aquino noticed that Badrinauth had a negative balance in the account. Aquino also noticed other irregularities with the account. As a result of Aquino's findings, MetLife commenced a formal investigation. The investigation revealed that Badrinauth had changed, without authorization, the address on the account from his fiancee's home address to his own home address. Badrinauth then made a series of withdrawals from the account even though he was required to obtain written approval from his fiancee before doing so. Badrinauth's fiancee testified at her deposition that she was not aware of all of the withdrawals that Badrinauth made from the account. MetLife's investigation also revealed that in February 2003 and May 2003, Badrinauth made several improper securities transactions involving the account.

In June 2003, Badrinauth met with MetLife investigators as well as Aquino. When asked about the February 2003 and May 2003 transactions,

Badrinauth admitted that he made the transactions and that he also circumvented proper procedure for requesting a change of address. Badrinauth claimed, however, that his fiancee had authorized the withdrawals. At the conclusion of the meeting, Aquino suspended Badrinauth's employment pending the conclusion of MetLife's investigation. On June 30, 2003, Aquino terminated Badrinauth's employment due to Badrinauth's ethical and policy violations.

Following his termination, Badrinauth brought a civil action in the District Court against MetLife and Aquino. In his February 2006 amended complaint, Badrinauth raised state and federal claims of racial discrimination and a hostile work environment as well as a state law claim of wrongful termination against MetLife.[2] Badrinauth also asserted a claim of defamation against both MetLife and Aquino. In March 2007, MetLife and Aquino moved for summary judgment on all of Badrinauth's claims. Soon thereafter, Badrinauth withdrew his claims of discrimination and a hostile work environment.

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[2] Badrinauth raised the claim pursuant to the New Jersey Supreme Court's ruling in *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N. J. 1980), which recognized a common law cause of action for wrongful discharge when an employee is discharged "contrary to a clear mandate of public policy."

In an April 2008 decision,[3] the District Court dismissed Badrinauth's defamation claim against MetLife and Aquino, but denied, without prejudice, MetLife's motion for summary judgment on Badrinauth's wrongful termination claim. In denying MetLife's motion as to that claim, the District Court instructed MetLife that it could renew its motion after the New Jersey Supreme Court rendered a decision in *Tartaglia v. UBS PaineWebber Inc.*, 961 A.2d 1167 (N.J. 2008), a case which the District Court expected would provide guidance on a legal question at issue in Badrinauth's case. Following the New Jersey Supreme Court's ruling in *Tartaglia*, MetLife renewed its summary judgment motion seeking dismissal of Badrinauth's claim for wrongful termination. In a May 7, 2009 decision, the District Court granted MetLife's renewed motion for summary judgment, dismissing Badrinauth's only remaining claim. Badrinauth filed a timely appeal.[4]

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[3] As noted earlier, the District Court amended its April 2, 2008 order in an order entered on April 8, 2008. The amended order clarified that Badrinauth previously withdrew his claims alleging racial discrimination and a hostile work environment.

[4] Badrinauth challenges the District Court's April 2008 order only with respect to the Court's decision to deny, without prejudice, MetLife's motion for summary judgment on Badrinauth's wrongful termination claim. Accordingly, he has waived review of the District Court's summary judgment in that same order as to his defamation claim. *See Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (an issue is waived unless a party raises it in its opening brief).

II.

We have jurisdiction over the appeal under 28 U.S.C. § 1291 and exercise plenary review over the District Court's decision to grant summary judgment. *McGreevy v. Stroup*, 413 F.3d 359, 363 (3d Cir. 2005). Summary judgment is appropriate when the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A court reviewing a summary judgment motion must evaluate the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 330 (3d Cir. 1995). However, a party opposing summary judgment "must present more than just 'bare assertions, conclusory allegations or suspicions' to show the existence of a genuine issue." *Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005).

As an initial matter, we conclude that the District Court appropriately denied, without prejudice, Defendants' motion for summary judgment on Badrinauth's claim of wrongful termination. Despite Badrinauth's claim that the ruling improperly gave MetLife a second "nip at the apple," the District Court's ruling did not address the merits of his wrongful termination claim. Instead, as mentioned earlier, the District Court wished to wait until the New Jersey Supreme Court rendered a decision in

Tartaglia before reviewing the grounds upon which MetLife sought dismissal of Badrinauth's claim.

We further conclude that the District Court properly granted MetLife's renewed motion for summary judgment on Badrinauth's claim for wrongful termination. As mentioned, in *Pierce,* the New Jersey Supreme Court recognized a common law cause of action for wrongful termination when an employee is discharged contrary to a clear mandate of public policy. 417 A.2d at 512. Badrinauth claimed that he was wrongfully terminated in retaliation for identifying MetLife's alleged failure to pay adequate overtime, and informing management that he would report the same to the DOL.

MetLife argued that Badrinauth's *Pierce* claim should be dismissed because: (a) he failed to fulfill the reporting requirement set forth in *Tartaglia*;[5] and (b) he failed to establish a causal connection between his alleged reporting of MetLife's overtime pay practices and his discharge from the company. Upon review of the record, the District Court concluded that there is a genuine issue of fact whether Badrinauth satisfied

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[5] In *Tartaglia,* the New Jersey Supreme Court determined that it is not necessary for a plaintiff to file an external complaint of a violation of public policy with an outside agency in order to sustain a cause of action for wrongful discharge. 961 A.2d at 1184. Instead, notification to upper management of such a violation may be sufficient. *Id.*

the reporting requirement set forth in *Tartaglia*.[6] Accordingly, the Court concluded that MetLife was not entitled to summary judgment on that basis. However, as to MetLife's argument that Badrinauth cannot establish a causal connection between his discharge and his alleged reporting of the overtime pay irregularities, the District Court agreed with MetLife that Badrinauth was wholly unable to establish causation.

Contrary to Badrinauth's assertion, his *Pierce* claim cannot survive summary judgment simply because he may be able to satisfy the reporting requirement prescribed by *Tartaglia*. He must also, inter alia, "show that he was in fact discharged in retaliation for taking action in opposition to corporate action which violates a clear mandate of public policy." *See House v.Carter-Wallace, Inc.*, 556 A.2d 353, 359 (N.J. Super. Ct. App. Div. 1989). The District Court correctly determined that Badrinauth was unable to set forth any evidence suggesting he was discharged in retaliation for his alleged reporting of improper overtime pay practices. Conversely, there is overwhelming evidence suggesting that Badrinauth was discharged for violating company policy regarding his brokerage account.

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[6] MetLife argues that the record entirely contradicts the District Court's determination that Badrinauth may have informed senior management about his concerns. Because we affirm the District Court's ruling on other grounds, we decline to review this aspect of the District Court's ruling.

Moreover, as the District Court aptly noted, there is a nearly four-month gap between Badrinauth's threatened notification to the DOL and his discharge. A claim for wrongful termination under *Pierce* may be dismissed on grounds that the lack of temporal proximity between the protected activity and the adverse employment action belies a causal connection. *Id.* Summary judgment was therefore appropriate.

Accordingly, we will affirm the District Court's rulings.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SURESH BADRINAUTH Plaintiff,	:	Civil Action No. 04-cv-2552 (PGS)
v.	:	**OPINION**
METLIFE CORPORATION Defendant.	:	(Filed Apr. 2, 2008)

SHERIDAN, U.S.D.J.

This matter comes before the Court on Defendant MetLife Corporation's ("MetLife") motion for summary judgment pursuant to Fed.R.Civ.P. Rule 56 (c), to dismiss the claims of Plaintiff Suresh Badrinauth ("Badrinauth") in their entirety. Badrinauth filed a Complaint based on various constitutional and state law claims including defamation, wrongful termination, and race/national origin discrimination in violation of the New Jersey Law Against Discrimination (NJLAD), and Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* Plaintiff filed the instant Complaint against Metlife Corp., and Virgel Aquino, and all Defendants have moved for summary judgment. This Court held oral argument on February 29, 2008, and a subsequent telephone conference on March 17, 2008.

Background

In 1996 Badrinauth, born in Guyana, began work with Nathan & Lewis Co., ("NL") a broker-dealer in New York. In 2002, Metlife acquired NL. As part of this acquisition, Mr. Aquino and another individual met with individuals from NL to discuss the transition to MetLife. Aquino was the Chief Operating Officer of BDRC. Robert Costello, a manager of the Broker Dealer Resource Center ("BDRC") Cashiering Operations Group interviewed plaintiff for a position. At this time, Alyssa Garrick was supervisor of the Cashiering Group. Badrinauth reported to Costello who reported to Aquino.

Mr. Costello offered Badrinauth a position which required a transfer to the Iselin, New Jersey office. According to Badrinauth, Mr. Costello promised him a promotion if he made the transition. From February 2002 through June 2002, Badrinauth remained at the New York office making periodic trips to the Iselin office. In June 2002, Badrinauth relocated full-time to the Iselin office. He relocated his residence to Edison, New Jersey, in 2003 (Compl. ¶¶12, 21).

Badrinauth alleges that in May 2002 he discovered that Metlife was failing to pay certain employees overtime at the required rate (Compl.¶ 31). Rather than paying time and half it paid $16 per hour. Badrinauth raised this issue with Costello in May 2002 and then again in February 2003. Badrinauth states that he threatened to inform the Department of Labor of this issue. Badrinauth testified that he

never reported any of these alleged violations to the Department of Labor or any other agency or regulatory body (Pl. Tr. 408:5-409:19). According to Badrinauth, Aquino issued checks for back pay to affected employees in March 2003 (Compl. ¶32).

Also in May 2002, Badrinauth opened a joint personal Brokerage Account with his fiancee, Marliese Flis, with an initial deposit of $40,000. As this was a joint account, Badrinauth was required to obtain Ms. Flis' signature for any transactions involving the account (O'Keefe Cert. Ex. 11 at 3). Through this Brokerage Account Badrinauth traded stocks.

Sometime in March 2003, Badrinauth received his first performance review for the 2002 year (Compl. ¶18). Costello indicated that plaintiff "met some expectations and/or contribution less than many others." The performance set forth some positive comments but generally was critical of plaintiff's performance (Def. Br. at 4 O'Keefe Cert. Ex. 10). The performance evaluation also noted that Badrinauth required many "second extensions"[1] and trade cancellations. According to Badrinauth this negative performance evaluation precluded his opportunity for a promotion; and Badrinauth concedes that he failed to apply for a promotion. In March 2003, Costello was

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[1] A second extension is the situation wherein a normal five-day period for paying securities transactions is extended for another five days, and then extended a second time for another five days.

promoted to Director of Cashiering and Garrick was promoted to Manager of the Cashiering Group. As a result Garrick became Badrinauth's supervisor

In June 2003, Badrinauth carried a negative balance in his Brokerage Account and Aquino noticed irregularities including trades not paid for, check disbursements without joint signatures, and a change of address entered from Badrinauth's computer. According to Aquino, Badrinauth was not authorized to perform such a change. Aquino contacted Metlife's Special Investigation Unit (SIU) to conduct an investigation (Aquino Tr. 125:126:4). The SIU investigation found that Badrinauth changed the address of the Brokerage Account from Ms. Flis' to his address, and this was a change that was beyond Badrinauth's authority (Aquino Tr. 125:16-126:4; O'Keefe Cert. Ex. 11 at 3). In addition, SIU uncovered that Badrinauth made several withdrawals from the account without Flis' consent and written authorization (Pl. Tr. 496:2-497:2; 499:10-8 and Flis Tr. 38:11-39:6, 40:25-42:1).

In addition, there were several questionable securities transactions totaling $100,000. In one transaction, knowing there was insufficient funds in his account, Badrinauth purchased stock hoping that the securities value would increase quickly and then he could sell them for a profit, thus covering the cost (Pl. Tr. 462:14-458:18, 460:16-22, 504:17-505:22). His ploy failed and resulted in a $7,800 loss. Badrinauth paid for the shares with a loan from his Savings and Investment Plan. As a consequence of this transaction, a restriction was placed on the brokerage

account in order to prevent any future transaction unless there were sufficient funds (Pl. Tr. 452:20-25).

In May 2003, Badrinauth undertook a short sale. The account manager noted that the funds were insufficient, and issued a margin call to Badrinauth. This call required a deposit of funds ($28,000) in order to cover the purchase. In lieu of payment, Badrinauth sold the shares at a loss of $4,800, and he paid this with a check. Contrary to regulations, he requested that a co-employee "back date" the check several days. According to Badrinauth, the "back date" was required due to a lost check; and that this is a common practice for upper management (Pl. Tr. 522-523).

On June 6, 2003, Aquino met with Badrinauth and SIU investigators. The subject of the meeting were the above referenced transactions. According to Badrinauth, he had Ms. Flis' permission for the address change and the withdrawals. At the meeting's conclusion, Aquino suspended Badrinauth's employment, which became permanent on June 30, 2003. The reason for the termination was Badrinauth's ethical and policy violations (Costello Cert. T21; Aquino Tr. 126:5-127:1).

After his termination, Badrinauth went to visit a former colleague at the Iselin office. This apparently upset other employees and security asked Badrinauth to leave and not return. Mr. Cordier, the head of security, posted a picture of Badrinauth at the security desk near the fourth floor elevator where BDRC was

located. Under this picture was the statement "not to be admitted in the building." (Cordier Tr. 14:11-15:1). Badrinauth then commenced this lawsuit on June 1, 2004.

Discussion:

Summary judgment is appropriate under Fed. R. Civ. P. 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant, and it is material if, under the substantive law, it would affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.' *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (*quoting Anderson*, 477 U.S. at 255).

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere

allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248; *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir. 1995). "[U]nsupported allegations . . . and pleadings are insufficient to repel summary judgment." *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990); *see also* Fed. R. Civ. P. 56(e) (requiring nonmoving party to "set forth specific facts showing that there is a genuine issue for trial"). Moreover, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgement. *Anderson*, 477 U.S. at 247-48. If a court determines, "after drawing all inferences in favor of [the non-moving party], and making all credibility determinations in his favor – that no reasonable jury could find for him, summary judgment is appropriate." *Alevras v. Tacopina*, 226 Fed. Appx. 222, 227 (3d Cir. 2007).

Badrinauth did not file a Rule 56.1 statement in accordance with the Local Civil Rules. Where a litigant fails to file the necessary Rule 56.1 statement, the Court will draw the facts from available sources including the pleadings and discovery materials. L.Civ.R. 56. 1, comment 2; see also *Jordan v. Allgroup Wheaton*, 218 F.Supp.2d 643, 646 (D.N.J.2002), *affd* 95 Fed. Appx. 462 (3d Cir.2004); *Colida v. Sharp Electronics*, 2004 U.S. Dist. LEXIS 27428 (D.N.J.2004), *aff'd* 125 Fed. Appx. 993 (Fed.Cir.), *cert. den.* 544 U.S. 1057 (2005).

During oral argument, and then confirmed during the March 17, 2008 telephone conference Plaintiff's counsel withdrew the claims based on race/national origin and hostile work environment. The parties agreed that the only remaining claims left for this Court's determination are Plaintiff's defamation claim, wrongful termination claim and Defendant's breach of fiduciary duty and loyalty claims.

Wrongful Termination Claim:

Badrinauth asserts wrongful termination in retaliation for identifying MetLife's alleged failure to pay overtime, and stating to management that he would report same to the Department of Labor (Compl. ¶31). New Jersey law provides that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (N.J.1980). "The sources of public policy include legislation; administrative rule[s], regulations or decisions; and judicial decisions." *Id.* Badrinauth admits that he never reported this allegation to any government body. *Tartaglia v. UBS Painewebber, Inc.*, 2006 WL 2560687 (App. Div. Sept. 7, 2006), *cert. granted* 911 A. 2d 849 (2007). The issue is whether a plaintiff asserting a *Pierce* claim is required to report the allegedly wrongful conduct to an entity outside his/her own organization. Plaintiff asserts that no such reporting requirement is necessary to maintain a *Pierce* claim,

while Defendant argues the opposite. This precise issue is before the Supreme Court of New Jersey for review. Since certification was granted more than a year ago, a decision will most likely be forthcoming in the near future. Accordingly, the Court denies the motion without prejudice. The motion may be renewed after the Supreme Court rules.[2]

Defamation:

Under New Jersey law, the establish a cause of action for defamation, plaintiff must show: "(1) a defamatory statement of fact; (2) concerning the plaintiff; (3) which was false; (4) which was communicated to a person or persons other than the plaintiff; (5) with actual knowledge that the statement was false or with reckless disregard of the statement's truth or falsity or with negligence in failing to ascertain the truth or falsity; and (6) which caused damage." *Santosuosso v. NovaCare Rehabilitation*, 462 F.Supp.2d 590, 600 (D.N.J. 2006) *citing Monroe v. Host Marriot Services Corp.*, 999 F.Supp. 599, 603 (D.N.J.1998) (*citing Feggans v. Billington*, 677 A.2d 771 (1996)).

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[2] Defendant will also be able to address any causal connection argument in any subsequent motion for summary judgment. Badrinauth was terminated in June 2003 and the alleged internal complaints in February 2002. *Jackson v. Campbell Soup*, 2002 U.S. Dist. LEXIS 27378, *28 (D.N.J. 2002)

Defendants argue that Badrinauth has failed to establish that the statement "not to be admitted into building" underneath his picture is a defamatory statement of fact. Badrinauth argues that a picture could libel a person as easily as a writing. 50 AM.Jur.2d Libel & Slander, §151. He relies on two cases. In one case, the court held that where plaintiff's picture inappropriately appeared in the midst of pictures of persons of ill repute, it is a jury question as to whether plaintiff was defamed. *Regan v. Sullivan*, 557 F. 2d 300 (2d Cir. 1977). In another case, the Court held plaintiff's photo where presented with a false statement that plaintiff requested a co-employee to engage in sexual activity was sufficient to set forth a claim of defamation. *Salek v. Passaic Collegiate School*, 255 N.J. Super 355 (App.Div. 1992); *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1977). Here, the picture plus the statement "not to be admitted into the building" does not rise to the level of injury to reputation as occurred in *Regan* or *Salek*. The claim is dismissed.

Defendant's Breach of Fiduciary Duty and Loyalty Claims:

Defendants also move for summary judgment on their breach of fiduciary duty and loyalty claims. Defendants when answering Badrinauths complaint asserted several counterclaims for breach of fiduciary duty based upon Badrinauth's removal of allegedly confidential proprietary information from MetLife's computers. Badrinauth concedes that he took

information from MetLife prior to his termination, but denies that it is confidential. Neither party has identified the exact information Badrinauth allegedly misappropriated.

An individual may be held liable for breach of loyalty and fiduciary duty for disclosure of confidential materials, but the court must first determine whether the documents are confidential. For example, disclosure or misuse of confidential customer lists may serve as a basis for a breach of the duty of loyalty. *Larnorte v. Burns & Co., v. Walters*, 770 A.2d 1158, 299 (2001). Since the nature and scope of the documents in plaintiff's possession are unknown, and since the documents have not been disclosed, it is impossible to evaluate the merits of this claim at the time. Motion denied.

In conclusion Defendant's motion for summary judgment as to (a) wrongful termination claim is denied without prejudice and may be renewed upon resolution of the *Tartaglia* case by the Supreme Court of the State of New Jersey; (b) claim for breach of fiduciary duty and loyalty is denied; and (c) the defamation claim is dismissed.

/s/ *Peter G. Sheridan*
PETER G. SHERIDAN, U.S.D.J.

April 2, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SURESH BADRINAUTH, Plaintiff, v. METLIFE CORPORATION, ET AL., Defendants.	Civil Action No. 04-cv-2552 (PGS) **MEMORANDUM AND ORDER** (Filed May 7, 2009)

The facts and determinations of the case are set forth in the Court's prior Opinion dated April 2, 2008 and are incorporated herein.

There are two issues left in this motion: (a) whether Plaintiff fulfilled the notice requirements of *Tartaglia v. UBS PaineWebber, Inc.*, 961 A. 2d 1167 (N.J. 2008) in his wrongful discharge suit, and (b) whether there is any causal connection between Plaintiff's actions to have certain employees paid overtime in accordance with statute and his discharge.

Under *Tartaglia,* the Supreme Court of New Jersey decided that it was not necessary for a plaintiff to file an external complaint of a violation of public policy with an outside agency in order to sustain a cause of action for wrongful discharge. In *Tartaglia,* the Supreme Court found notification to upper management of a violation of public policy may be sufficient. Justice Hoens in her opinion stated:

> That is to say, a complaint to an outside agency will ordinarily be a sufficient means of expression, but a passing remark to co-workers will not. A direct complaint to senior corporate management would likely suffice, but a complaint to an immediate supervisor generally would not.

Id. at 1193. Mr. Badrinauth complained in May 2002 to Robert Costello, his superior, about the failure to pay appropriate overtime to employees. According to the papers submitted, MetLife held meetings with the affected employees in December 2002 and issued compensatory back-pay to each at that time. Plaintiff also submitted an affidavit contrary to his deposition stating that in 2002 he spoke to Virgil Aquino, Mr. Costello's direct supervisor, about the wrongful pay. Since MetLife's motion for summary judgment is before this Court, and giving all reasonable inferences to Plaintiff, his notice to Mr. Aquino as senior manager is a sufficient expression of a violation of public policy to upper management.

Defendant MetLife further contends there is no causal connection between Plaintiff's termination and his notice of violation of public policy to the defendants. *See id.* at 1192. Evidently, in May and June 2003, about 3-6 months after overtime payments were rectified, Plaintiff was in serious violation of company policies for irregular trading practices, including a negative balance in his brokerage account and a check disbursement where joint signatures of Plaintiff and his fiancee were necessary

but did not occur. Having uncovered Plaintiff's non-compliance, Mr. Aquino referred the matter to the Special Investigations Unit of MetLife. The unit found that Mr. Badrinauth, without Marliese Flis's (his fiancee's) permission, (a) withdrew the money from the joint account, and (b) changed the address on the account from Ms. Flis's to his address. Based on these financial trading violations, he was suspended and then dismissed a month later.

In this matter, the corporate policy to uphold financial integrity of each transaction in the market is essential. MetLife undertook strong deliberate action in defense of its corporate policy. The dismissal was warranted for Plaintiff's non-compliance with ordinary trading practices. In short, there is no causal connection between Plaintiff's termination for irregular trading practices and his notification to Defendants regarding the violation of public policy. Here, the irregular trading practices are a superceding cause. Without such a connection, summary judgment is appropriate. There is no issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327-28 (1986).

THEREFORE, based upon the above,

IT IS on this ~~5~~ [7]th day of May, 2009,

ORDERED that Defendant MetLife's Motion for Summary Judgment is Granted, and the case is dismissed with prejudice.

/s/ Peter G. Sheridan
PETER G. SHERIDAN, U.S.D.J.

May 5, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2631

SURESH BADRINAUTH,

Appellant

v.

METLIFE CORPORATION; VIRGEL AQUINO

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 04-cv-2552)
District Judge: Honorable Peter G. Sheridan

Present: McKEE, *Chief Judge*, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, VANASKIE and GARTH,* *Circuit Judges*.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated

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* Judge Garth's vote is limited to panel rehearing only.

in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher
Circuit Judge

Dated: May 26, 2010

Supreme Court, U.S.
FILED
JAN - 7 2011
OFFICE OF THE CLERK

No. 10-556

In The
Supreme Court of the United States

SURESH BADRINAUTH,

Petitioner,

v.

METLIFE CORPORATION; VIRGEL AQUINO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. PETITION FOR REHEARING 1

II. DISCUSSION 1

A. The decision by Associate Justice Samuel Alito to NOT recuse himself, when there was a profound and proven conflict of interest, contaminated the Court's decision to deny certiorari on December 13, 2010 1

B. Chief Justice Roberts' 2010 year-end report, on the necessity and importance of confirming federal judges, mandates that the court hear this very issue, which is presented in this petition 2

C. This court's function to remand cases that have (ten) egregious and axiomatic errors, begs for this action to be taken in this petition 4

TABLE OF AUTHORITIES

Page

CASES

Ambler v. Whipple, 90 U.S. 278 (1875) 2

Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960) 2

Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11 (1954) 2

I. PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, petitioner Suresh Badrinauth respectfully petitions the Court for rehearing of its decision on December 13, 2010.

II. DISCUSSION

A. One of the Appellate Judges at the Third Circuit Court of Appeals who ruled on this case is Judge Leonard Garth. Associate Justice Samuel Alito of this Court clerked for Judge Garth for several years. After Justice Alito was confirmed as an appellate Judge, he worked with Judge Garth for many more years. At Justice Alito's confirmation before the senate, Judge Garth appeared and passionately pleaded for Justice Alito, and the two of them have since remained close friends.

Justice Alito does not participate in the "cert pool", and thus his office is cognizant and aware of the pleadings and intricacies of *every* petition presented before this court. Therefore, Justice Alito was aware that this case emerged out of the chambers of his mentor Judge Garth (and the subsequent complaint filed against him), and to preserve the integrity of this court should have immediately recused himself from any discussions. Every week, this Court released orders that are replete with Justices recusing or not participating in the decisions and outcome of cases. The Court's order list of December 13, 2010 lists several other Justices recusing themselves from other cases for matters less egregious and

conflicting that Justice Alito and his relationship with the ruling lower court Judge on this case. In *Ambler v. Whipple,* 90 U.S. 278, 282 (1875): "*If the omissions . . . on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument.*"

In order to maintain the reputation, integrity and the appearance of fairness, this Court must rehear this case without the input or participation of Justice Alito. U.S. Supreme Court Justice the Honorable Felix Frankfurter said in his opinions regarding *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954) and *Levine v. United States,* 362 U.S. 610, 80 S.Ct. 1038 (1960) that "**justice must satisfy the appearance of justice**."

Without a rehearing, and a recusal by Justice Alito the denial of Certiorari by this court on December 13, 2010 will result in an injustice which was compounded by an appearance of injustice. Indeed!!

B. Chief Justice of the United States John Roberts, focused part of his annual 2010 year-end report on the problem he sees hampering the judicial branch: political intransigence in confirming federal judges. Judge Roberts sees this as one "immediate obstacle" to improve the performance of the federal judiciary.

Chief Justice Roberts believes the process of nominating and confirming federal judges has become a persistent problem. Chief Justice Roberts wrote, "Each political party has found it easy to turn on a

dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes."

Statistics from the Federal Judicial Center show that more than 10% of the 876 federal judgeships are vacant. "This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads," Roberts added.

In July, American Bar Association President Carolyn Lamm said the problem affects the efficiency and fairness of the judicial system. "We have speedy trial rules that require [judges] to put criminal cases first. As a result, all of the civil proceedings are put off and there is a real gap in terms of a significant delay as a result of the vacancies. It is edging toward a crisis not to have a full bench.

The real tragedy here is that legal scholars, attorneys and law professors do not expect that there will be any action to the Chief Justice's admonition or pleadings in his year-end report. Chief Justice John Roberts has the ability to act unilaterally, to ensure compliance of litigants' rights of due process guaranteed under the Constitution. Also, the willful delay and or denial in the confirmation of federal judges violates the Constitution's guarantee of expeditious trials.

This very issue is raised in the first two questions presented in this petition. **And if Chief**

Justice Roberts is indeed serious and truly wants to serve the American people - - - this petition gives him an opportunity to do, by enacting a statute that restates the body of a particular area of law including applicable common law principles and the judicial interpretation of previous or existing statutes.

C. One of the functions of this Court is that when presented with a clear and proven miscarriage of the law . . . is to REMAND the case back to the lower Court for further review. I respectfully submit that this is the situation which this Court is presented with here. Listed below are TEN (10) PROVABLE errors made by the Third Circuit court of appeals.

1. The Third Circuit ruled in defense of the defendants' "policies" which are not known, do not exist and were not presented to the Court.

2. The District Court made at least seven (7) proven errors in this case, many which are not even disputed by the respondents. The three judge panel at the appellate Court did not address this matter in any way, shape or form. This action conflicts with rulings and opinions of similar cases both in this circuit and other Circuits as well.

3. The Appellate Court erred in concluding that temporal proximity was "approximately four month gap," when in fact the record presented in the briefs proves that it was approximately five weeks.

4. The Appellate Court did not find any evidence of causal connection, when the evidence presented in the briefs clearly showed that there were at least FIFTEEN (15) incidents of causal connection.

5. The District Court unilaterally and without prompting or request, recommended how the defendant should proceed by giving them an opportunity to file a second motion for summary judgment. Defendants have also previously filed motions to dismiss on the same issues. And then the court promptly ruled in their favor. Without considering all of the evidence in its superficial judgement (see # 8) the Appellate Court allowed this biased ruling to stand.

6. There were conflicting rulings and opinions by two different judges on the same issue in this case. The appellate Court did not address or consider the detailed and reasoned ruling by the initial judge (Honorable Judge Greenaway Jr.) who has spent much longer on the case than the final ruling judge.

7. In every Pro Se Petitioner case presented before the Third Circuit (and other Circuits), the subsequent opinion always acknowledge the petitioner is proceeding . . . pro se. In the Court's opinion of this case dated March 09, 2010, nowhere is any acknowledgement that the petitioner is proceeding pro se.

8. The appellate court in its "plenary" ruling considered nearly seven hundred pages of evidence, several lower courts rulings and opinions and also wrote their eight page opinion on the same day.

Reasonable minds would conclude that it is highly unlikely that the appellate Court's opinion could be thorough and fair.

9. Even though the Pro Se Petitioner submitted both the reply brief and accompanying affidavit at the same time, the appellate Court did not consider the affidavit, which contradicted many of the Court's findings.

10. The appellate Court ruled on the admissibility of petitioner's reply affidavit one week AFTER it made its final ruling, even though it was received at least one week before the deadline.

These are all easily proven by simply reading the briefs presented at the appellate Court. We respectfully submit that this should strongly move this court to apply one of the functions it is charged with to ensure that justice is truly served and . . . REMAND the case back to the appellate court for further review.

CONCLUSION

Based upon the foregoing, associate Justice Samuel Alito should have recused himself from all deliberations, the Court should grant the petition for rehearing, vacate the Third Circuit's Opinion of March 09, 2010 and/or remand the case for review at the Appellate Court.

CERTIFICATE OF COUNSEL

As Pro Se Petitioner, I believe this petition for rehearing to be meritorious and hereby certify that this petition is presented in good faith and not for purposes of delay.

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